

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

STATE OF TEXAS, *et al.*,

Plaintiffs,

v.

**RISING EAGLE CAPITAL GROUP,
LLC, *et al.*,**

Defendants.

Civil Action No. 4:20-cv-02021

**UNITED STATES' RESPONSE TO HEALTH ADVISORS OF AMERICA, INC.
AND MICHAEL T. SMITH'S MOTION *IN LIMINE***

Defendants Health Advisors of America, Inc. (HHA) and Michael T. Smith (collectively, "HHA Defendants") have submitted a motion *in limine*, ECF No. 231-9, attempting to preserve for trial the same argument, based on the Supreme Court's opinion in *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (*AAPC*), that this Court has previously rejected in this litigation. Because Defendants have already adequately preserved this issue for appeal, the United States respectfully requests that this Court exclude any argument on this issue at trial. The United States also respectfully requests the opportunity to appear at the conference set for Friday, May 19 at 3:00 PM to the extent necessary to discuss the issues contained herein.

In particular, HHA Defendants seek to preserve the argument that this Court lacks

subject-matter jurisdiction over Telephone Consumer Protection Act (TCPA) claims that occurred prior to July 6, 2020. HHA Defendants cite the Supreme Court’s opinion in *AAPC* holding that the government-debt exception on the TCPA’s cell phone restriction, contained in 47 U.S.C. § 227(b)(1)(A)(iii), was unconstitutional but severable from the remainder of the statute. ECF No. 231-9 at 1–2. But HHA Defendants adequately preserved this issue for appeal by presenting it in their motion to dismiss. ECF No. 93 at 7–9. Indeed, this Court already expressly rejected this argument in denying HHA Defendants’ motion to dismiss. ECF No. 133 at 2–3. This Court explained that “[n]umerous courts have addressed [HHA] Defendants’ argument; nearly every one has rejected it, including the only circuit court that has considered it.” *Id.* (collecting cases). Given that HHA Defendants’ argument regarding *AAPC* merely rehashes the argument already rejected by this Court, and given that HHA Defendants have thus already preserved this argument for appeal, this Court should bar HHA Defendants from re-presenting this argument at trial.

Moreover, since this Court’s order denying HHA Defendants’ motion to dismiss on September 27, 2021, several additional district courts have considered and rejected the same argument. *See, e.g., Canady v. Bridgecrest Acceptance Corp.*, No. CV-19-04738-PHX-DWL, 2022 WL 194526, at *9 (D. Ariz. Jan. 21, 2022); Order, *Moore v. Heath*, No. 2:21-cv-27-TC-CMR (D. Utah Oct. 8, 2021), ECF No. 44 (referencing reasoning as announced in oral decision); *Poonja v. Kelly Services, Inc.*, No. 20-cv-04388, 2021 WL 4459526, at *5 (N.D. Ill. Sept. 29, 2021); *Marshall v. Grubhub*, No. 19-CV-3718, 2021 WL 4401496, at *4 (N.D. Ill. Sept. 27, 2021); *Hogans v. Charter Commc’ns*, No. 5:20-cv-

566-D, 2021 WL 4391226, at *10 (E.D.N.C. Sept. 24, 2021). Prior to this Court's order but after the United States submitted its brief in support of the constitutionality of the TCPA, *see* ECF No. 108, two district courts within the Fifth Circuit also considered and rejected the same argument, *see Thomas v. Life Protect 24/7 Inc.*, No. 4:20-CV-03612, 2021 WL 4127144, at *7 (S.D. Tex. Sept. 10, 2021); *Cano v. Assured Auto Grp.*, 2021 WL 3036933, at *7 (N.D. Tex. July 19, 2021). In contrast, only one additional court has since accepted HHA Defendants' argument, *see* Order at 5–6, *Bennett v. Veterans Aid PAC, Inc.*, No. 4:21-cv-00340-ALM (E.D. Tex. June 13, 2022) (Mazzant, J.), ECF No. 55, and that opinion was rendered by the same judge who has previously accepted this argument, *see Cunningham v. Matrix Fin. Servs., LLC*, No. 4:19-CV-896, 2021 WL 1226618, at *11 (E.D. Tex. Mar. 31, 2021) (Mazzant, J.).

Accordingly, this Court should exclude any argument at trial that this Court lacks subject-matter jurisdiction over TCPA claims that occurred prior to July 6, 2020.

Dated: May 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2023, a copy of the foregoing document was filed electronically via the Court's ECF system, which sent notification of such filing to counsel of record.

/s/ Cassandra M. Snyder

CASSANDRA M. SNYDER